(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 245.

MAURICE STECKLER, Administrator C. T. A. of the Estate of David Steckler, Deceased,

Petitioner,

v.

THE PENNROAD CORPORATION; FIDELITY-PHILADELPHIA TRUST COMPANY, sole and substituted Executor of the Estate of William Wallace Atterbury, Deceased; JAY COOKE, sole surviving Executor of the Estate of Jay Cooke, Deceased; ALBERT J. COUNTY; WILLIAM M. ELKINS; HERBERT W. GOODALL; RODMAN E. GRISCOM; JOHN H. W. INGERSOLL, C. JARED INGERSOLL, R. STURGIS INGERSOLL and HENRIETTA A. S. INGERSOLL, Executors of the Estate of Charles Edward Ingersoll, Deceased; ALEXANDER D. IRWIN; EDITH CARPENTER LEE and THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Executors of the Estate of Henry H. Lee, Deceased; JOHN H. MASON; HERBERT A. MAY; RICHARD KING MELLON, SARAH MELLON SCAIFE and THE UNION TRUST COMPANY, Executors of the Estate of Richard B. Mellon, Deceased; EFFINGHAM B. MORRIS, JR., and GIRARD TRUST COMPANY, Executors of the Estate of Effingham B. Morris, Deceased; FRANCIS J. RUE and FIDELITY-PHILADELPHIA TRUST COMPANY, Executors of the Estate of Levi L. Rue, Deceased; P. BLAIR LEE and G. WILLING PEPPER, Executors of Estate of Joseph Wayne, Jr., Deceased; and MARK WILLCOX,

Respondents.

RESPONDENTS' BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI.

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OCTOBER TERM, 1943. No. 245.

Maurice Steckler, Administrator c. t. a. *of the Estate of David Steckler, Deceased,*

Petitioner,

v.

The Pennroad Corporation, et al.,

Respondents.

RESPONDENTS' BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI IN AMPLIFICATION OF PETITIONER'S STATEMENT OF MATTERS INVOLVED, PLEADINGS, AND STATUTES INVOLVED.

Petitioner has neglected to include in the statement of his petition the following pertinent factors:

(1) The penal provision of the New York Statute applicable to the alleged violation, being Sec. 58 of the Public

Service Law of the State of New York (Chapter 48 of the Consolidated Laws, L. 1910 c. 480 as amended, McKinney's, Book 47), is as follows:

> "1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this chapter, or shall fail to obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force, shall forfeit to the people of the State of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in action as provided in section twenty-four of this chapter.
>
> "2. Every person, who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this chapter, or fail to obey, observe or comply with any order made by the commission under this chapter so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this chapter, or in its failure to obey, observe or comply with any such order, shall be guilty of misdemeanor.
>
> "3. In construing and enforcing the provisions of this chapter relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to

be the act of such common carrier, railroad corporation, street railroad corporation or corporation."

(2) By the express terms of Sec. 54 of the Public Service Law of the State of New York, all purchases with respect to which Sec. 58 pertains may be made with the consent of the Commission, which if not obtained subjects, under Sec. 24, the offender to penalties in a suit instituted in the State of New York, and nowhere else by counsel of the Commission.

(3) The Amended Bill of Complaint contains no allegation that the Public Service Commission of New York or any other New York authority has ever complained of or moved with respect to the alleged violation of the statute.

(4) Section 5, Chapter 156 of the general laws of Massachusetts (Tercentenary Ed. 1932, Vol. II, p. 1955, Mass. Acts, 1913, c. 597), applies only to the acquisition of stock by a Massachusetts corporation, the Chapter 156 of which the Section 5 relied upon by the petitioner is a part, being the general law of Massachusetts business corporations as revealed by the following sections of that law:

"Section 1. In this chapter, unless a contrary intention appears, 'corporation' shall mean a corporation to which, under section two, this chapter applies,"——

"Section 2. Except as expressly made applicable by reference in subsequent chapters, this chapter shall not apply to corporations organized for the purpose of carrying on the business of a bank. * * * *It shall apply to all other domestic corporations* having a capital stock and heretofore or hereafter established."

ARGUMENT.

A. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF THE WRIT.

In review of the reasons which will be considered as outlined in Rule 38 (5) of the Supreme Court of the United States, we respectfully submit:

(*a*) This case is in a Federal Court solely on the ground of diversity of citizenship, the complainant being a resident of New York, the corporate defendant a resident of Delaware, and the individual defendants residents of Pennsylvania.

(*b*) A decision of a State Court is not involved.

(*c*) The petition for the writ does not and could not properly suggest that the decision is in conflict with the decision of any other Circuit Court of Appeals on the same or even a similar matter.

(*d*) The decision is with respect to local statutes, one of New York, one of Massachusetts, but there is no important question of local law involved. The Circuit Court in its decision by footnote refers to a writer in the Yale Law Journal reporting that "A survey of Moody's manuals has revealed no multiple corporations among the Industrial and Public Utility Corporations, and only 68 among the railroads. See Note (1937) 46 Yale L. J. 1370, 1382 F. N. 88" (transcript of record, p. 69). The only bearing of the decision would be its possible influence upon the courts of New York and Massachusetts in deciding the applicability of their own statutes on the minute number of cases that might come before those courts with multiple corporations as parties. The decision would not even be binding upon those courts. The legal significance of the decision, aside from the determination of this particular case, is therefore practically *nil.*

(*e*) The decision is not in conflict with applicable local decisions.

The decision notes that the Supreme Judicial Court of Massachusetts in *Flynn* v. *Commissioners of Department of Public Utilities,* 302 Mass. 131, 18 N. E. (2d) 538 (1939) in a "forthright statement," meaning "precisely what it said," decided that the Massachusetts statute does not prohibit a foreign corporation from the acts of the corporate defendant complained of by the plaintiff (transcript of record, pp. 66, 67).

The Circuit Court then considered whether the New York statute applied to the purchase of stock of a multiple corporation. In support of a negative answer to that question the Circuit Court mentioned: *People* v. *New York C. & St. L. Co.,* 129 N. Y. 474, 654, 29 N. E. 959 (1892); *In Re Matter of Cooley,* 186 N. Y. 220, 78 N. E. 939 (1906); *New York Central Railroad Co.* v. *Flynn,* 233 App. Div. 123, 251 N. Y. Supp. 343 (3rd Dept. 1931), affirmed 57 N. Y. 553, 178 N. E. 791 (1931) (transcript of record, pp. 69 and 70).

Those cases are upon New York tax statutes, and as pointed out by the Circuit Court, they definitely determine that the phrase in the statutes, "organized or existing under or by virtue of the laws of this State," does not include multiple corporations organized or existing under the laws of several states, of which New York is one. Though the Circuit Court says that it does "not think the tax cases are conclusive upon the point," the Circuit Court is manifestly impressed by their weight and we find in the opinion:

> "The tax cases show that all the statutes applicable to domestic corporations do not necessarily become applicable to a multiple corporation. We are not clear that the one quoted above (the statute relied upon by the plaintiff) is applicable; it may be." (Transcript of record, p. 71.)

The Circuit Court finds no New York decision *contra* to the view that the statute does not apply to a multiple corporation, and therefore it can properly be said, and we aver, that if the Circuit Court had decided the New York question on the sole ground that the New York statute did not apply to a multiple corporation, such a decision would not in any way be in conflict with any applicable New York decision.

The Circuit Court decided the New York aspect of the case on two other counts. The count involving a local decision being that the Public Service Commissioner of New York was the only party entitled to raise the issue. It analyzed and quoted in support of this view the New York case of *Gray* v. *Gill,* App. Div. 233 App. 809, 227 N. Y. Supp. 816 (4th Dept. 1928), in the Court of Appeals 250 N. Y. 519, 166 N. E. 308 (1928) (transcript of record, p. 73). There is no suggestion in the petition that there has been any case decided by any New York court in conflict with Gray *v.* Gill, *supra.*

(*f*) The decision decides no question of Federal law.

(*g*) The decision decides no Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States. If the finding that "such an action (the proceedings initiated by the plaintiff's bill) would not be entertained in the state courts of Pennsylvania nor can it be maintained by a Federal court in the district of Pennsylvania having jurisdiction because of diversity of citizenship" (transcript of record, p. 76), be considered a Federal question, it was certainly decided correctly and in no sense in conflict with the applicable decisions of the United States Supreme Court. *Klaxon Co.* v. *Stentor Elec. Manufacturing, Inc.,* 313 U. S. 495 (1941); *Griffin* v. *McCoach,* 313 U. S. 498; *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

B. THE DECISION OF THE CIRCUIT COURT IS NOT IN ERROR.

The respondents to the petition for the writ pressed upon the Circuit Court the following views, and in listing them we will mention the disposition made of the point by the Circuit Court.

(*a*) *The Massachusetts statute contains no prohibition against the defendant Pennroad purchasing more than ten percent of the capital stock of the Boston & Maine Railroad.* In support thereof respondents cited *Flynn* v. *Commissioners of Department of Public Utilities,* 302 *Mass.* 131, 18 N. E. (2d) 538 (1939). The Circuit Court fully adopted this view, stating that the Supreme Court of Massachusetts "meant precisely what it said" in concluding that only domestic corporations were forbidden to hold more than ten percent of the stock of utility corporations and that "this forthright statement as to the applicability of paragraph 5 is conclusive upon us as to the Massachusetts law." (Transcript of record, p. 67.)

(*b*) *The New York statute pertaining to the purchase of capital stock of a railroad corporation "organized or existing under or by virtue of the laws of this state," by its very terms did not refer to the purchase of stock of a corporation such as is the Boston & Maine, organized and existing under the statutes of the state of New York and other states.* In support of that point the respondents, before the Circuit Court, cited *People* v. *New York C. & St. L. R. Co.,* 129 N. Y. 474, 654, 29 N. E. 959 (1892); *Venner* v. *New York Central & H. R. R. Co., et al.,* 164 N. Y. S. 626, 226 N. Y. 583, 123 N. E. 870; *Ohio & M. R. Co.* v. *People,* 123 Ill. 467, 14 N. E. 874; *New York Central R. R. Co.* v. *Flynn,* 233 App. Div. 123, 251 N. Y. S. 343; affirmed by the Court of Appeals, 57 N. Y. 553, 178 N. E. 791; and *Matter of Cooley,* 186 N. Y. 220, 223, 78 N. E. 939 (1906); *State Treasurer* v. *Auditor General,* 46 Mich. 224, 9 N. W. 258; and the very pertinent fact that

Section 140 *et seq* of Article 4, Chapter 49 of Consolidated Laws of New York, known as the Railroad Law, Book 48 McKinney's, p. 152 *et seq.* with respect to consolidation, lease, sale and reorganization; with respect to local taxation; and with respect to the lessee of a railroad acquiring stock in the landlord company draws with respect to each category the distinction between a railroad organized under the statutes of the state of New York alone and a multiple corporation, by the use in the statute of the phrase: "Organized under the laws of this state *or of this state and any other state.*"

As heretofore pointed out, the Circuit Court clearly indicated that the above mentioned New York cases were probably controlling of the point and in full relief of these respondents, but for the sake of final certainty decided the question on other points.

(*c*) *If the New York or the Massachusetts statute applied to the transaction under consideration, those statutes might only be applied within the territorial limits of the respective statute-making states.* The respondents argued that the Boston & Maine originally had certain charter rights and obligations, among them being the right and the obligation to transfer its stocks to its stockholders as they might from time to time be constituted. This right and obligation stemmed from the legislation of four states, Maine, New Hampshire, Massachusetts and New York. Respondents pointed out that if the plaintiff in this suit were correct, a New York statute abrogating the Boston & Maine Railroad's right to operate and in relief of its obligation to operate a railroad, would deprive the Boston & Maine of the right and relieve it of the obligation to operate a railroad in the states other than the statute-making state. An absurd result, but no more absurd than the claim of the plaintiff.

Respondents argued, using the words of Justice Andrews in *People* v. *New York, Chicago & St. Louis*

R. R. Co., 129 N. Y. 474, 29 N. E. 959, that the Legislature of a single state is "impotent alone to accomplish" the result desired by the plaintiff. The respondents further referred to *Attorney General* v. *New York, New Haven & Hartford R. R. Company*, 198 Mass. 413, 84 N. E. 737; *Mackay* v. *New York, N. H. & H. R. R. Co.*, 82 Conn. 73, 72 Atl. 583, as authority for the proposition that if a limitation on a corporate right enacted by one of the states creating a multiple corporation will not be recognized in sister states creating that corporation, it positively may not be recognized in Pennsylvania, a state in which the corporation is in no sense domiciled or to which it is in no sense related.

The Circuit Court reached the respondents' conclusion, quoting as the reason for the rule that no action can be maintained on a right created by the law of a foreign state as a method of furthering that foreign state's governmental interests Judge Learned Hand's statement in *Moore* v. *Mitchell*, 30 F. 2d, 600, 604 (C. C. A. 2, 1929), affirmed 281 U. S. 18 (1930)—"To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between states themselves with which others are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor."

(*d*) *The statute referred to in the complaint gives no right of action to the plaintiff against the defendants.* The respondents pressed the case of *Gray*, v. *Gill, supra.* The Circuit Court agreed.

(*e*) The respondents before the Circuit Court also pointed out that the plaintiff in the court below did not and could not aver that the alleged violation of the statutes is or will be in any manner the legal cause of any loss

the Pennroad Corporation might suffer by reason of its investment in Boston & Maine stock; and further, that the application of the statutes of the State of New York, as demanded in the complaint, would be an unlawful delegation of legislative authority and in violation of the Constitution of the State of New York; and further, the application, as demanded in the complaint, of the statutes would be in violation of the Commerce Clause, Article 1, Sec. 8 of the Constitution of the United States, and the Act of Congress of date June 16, 1933, delegating to the I. C. C. jurisdiction with respect to companies other than railroad companies in regard to the acquisition of securities of railroad companies by non-railroad companies—U. S. C. A. Title 49, Sec. 54 as amended.

The Circuit Court, having eliminated the Massachusetts question on the basis of the specific decision of the Supreme Judicial Court of Massachusetts, and having been tempted to but having refrained from fully eliminating the New York question by a determination that the New York statute was in no sense applicable to a multiple corporation, decided the New York question upon the points mentioned in paragraphs (*c*) and (*d*) *supra*, and therefore made no reference whatsoever to the points presented by these respondents and mentioned in the immediately preceding paragraph.

CONCLUSION.

We submit that there is nothing in this case that calls for a review by the Supreme Court of the United States on a writ of certiorari, and moreover, we submit that the decision of the Circuit Court of Appeals of the Third Circuit was a correct disposition of all matters at issue.

The respondents therefore respectfully pray that the petition for a writ of certiorari be dismissed.

Respectfully submitted,

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